

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 1, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2175

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF DANE,

Plaintiff-Respondent,

v.

JAMES V. BUCHANAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
MARK J. FARNUM, Judge. *Affirmed.*

SUNDBY, J. Appellant James V. Buchanan appeals from a judgment entered after a trial to the court convicting him of speeding.¹ He presents the following issues:

¹ This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS. "We" and "our" refer to the court.

(1) Did the trial court err when it determined that the sheriff's deputy properly operated the moving radar unit and that the County met its burden to show that Buchanan operated his vehicle in excess of the posted speed limit? We conclude that the trial court did not err.

(2) Did the trial court err as a matter of law when it drew an inference of guilt from Buchanan's failure to testify? We conclude that the trial court's statement relative to inferences which could be drawn from Buchanan's failure to testify was merely a response to statements defense counsel made during closing argument. The trial court's decision does not show that the court relied on Buchanan's failure to testify.

We therefore affirm the judgment.

On April 21, 1994, Dane County Deputy Sheriff William J. Farmer was proceeding westbound on U.S. Highway 18/151 when he observed a vehicle proceeding eastbound travelling at a high rate of speed. Farmer estimated the vehicle's speed at approximately eighty miles per hour. The speed limit at that location was fifty-five miles per hour. Upon cresting a hill, Farmer beamed in on Buchanan's vehicle. He received both a visual and audio reading of eighty-one miles per hour and eighty-two miles per hour. Farmer estimated he was approximately 200 to 300 feet from Buchanan's vehicle when he first activated the radar.

Farmer used a moving radar system with the tradename H.A.W.K. Farmer had been trained in the operation of this unit and had practiced using this unit in the field. He had nearly two years of practical experience using the unit.

Prior to Buchanan's arrest, Farmer checked the calibration of the unit, using both internal and external means, and determined that the unit was operating properly. After issuing Buchanan a citation, Farmer performed follow-up tests on the unit. These tests were identical to the ones he performed earlier, which included the use of tuning forks. He found no reason to question the accuracy of the speed readings.

At trial, James R. Rekowski, testified for Buchanan. The court accepted that Rekowski was an expert in the use of radar devices, although he had merely reviewed the operating manual of the unit Farmer used. He gave his opinion based on time and distance measurements that Farmer could not have gotten an accurate reading as to the speed of Buchanan's vehicle or verified the unit's accuracy. He also testified that Farmer did not follow proper training procedures. Specifically, Farmer did not verify the input speed of his patrol car.

In rebuttal, Farmer testified that in patrolling the location where he arrested Buchanan, he used the radar unit on a daily basis. He had patrolled this area on and off for twenty-seven years. Rekowski testified that the location of high voltage lines in the area could have affected the unit's ability to accurately record Buchanan's speed. However, Deputy Farmer testified that he would not have gotten the signals or readings he got from the unit if it was not operating properly or was obstructed or influenced by environmental factors.

During closing arguments, the trial court interrupted Buchanan's counsel and stated that "some inferences could be drawn from the fact that [Buchanan] didn't testify." The trial court's remark was merely a response to statements defense counsel made during his closing argument. It is evident, however, from the trial court's decision that it did not rely on Buchanan's failure to testify. Further, this was a civil case. The privilege against self-incrimination does not apply in a civil case. Section 905.13(4), STATS.

Buchanan acknowledges that the constitutional privilege against self-incrimination did not apply in this case. He argues, however, that he was deprived of his due process right to a fair trial because the court relied on Buchanan's failure to testify. He argues that the fairness to which a defendant is entitled includes the right to require the state or a municipality to meet its burden of proof without attaching any significance to defendant's failure to testify. Buchanan also points out that the County could have called him adversely; therefore, it was unfair for the trial court to draw any inference from Buchanan's failure to testify.

Whether to call the defendant in a civil forfeiture case is a matter of trial strategy. As between the prosecutor and the defense counsel, we believe

the prosecutor may elect not to call the defendant where he or she believes that such evidence is unnecessary to establish the state's or municipality's case. We do not accept that the prosecutor's case is in any way diminished by the prosecutor's failure to use defendant's testimony to convict. We also reject the proposition that the weight of the prosecution's evidence is in any way affected by the prosecutor's failure to call the defendant as a witness.

We do not believe that the testimony of Buchanan's expert witness eroded the reliability of the readings Farmer recorded from the moving radar unit. Further, while it has become customary for jurisdictions to rely on scientific instruments and scientific evidence to establish defendant's guilt in traffic cases, the state's or municipality's case does not stand or fall on the evidence presented by such devices. While science has greatly aided in the measurement of physical events or conditions, any doubt as to the accuracy or reliability of such devices merely affects the quantity and quality of the evidence. Defendants may be convicted simply upon the testimony of an experienced and properly trained law enforcement official. Deputy Farmer had patrolled this highway and the specific area where Buchanan was arrested, on and off for twenty-seven years. His trained observations may be as reliable as scientific measuring devices such as radar units and intoxilyzers. We are satisfied that the County established its case by clear and convincing evidence. We therefore affirm the judgment.

By the Court.--Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.